

## Part III - Administrative, Procedural, and Miscellaneous

### Exempt Facility Bonds for Qualified Highway or Surface Freight Transfer Facilities

Notice 2006-45

#### **PURPOSE**

This notice provides guidance relating to exempt facility bonds for qualified highway or surface freight transfer facilities under sections 142(a)(15) and 142(m) of the Internal Revenue Code (the Code).

#### **INTRODUCTION**

Section 11143 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users or “SAFETEA-LU”, Pub. L. No. 109-59 added sections 142(a)(15) and 142(m) to the Code. In general, sections 142(a)(15) and 142(m) authorize up to \$15,000,000,000 of tax-exempt private activity bonds to be issued by State or local governments for a new type of exempt facility--qualified highway or surface freight transfer facilities.

#### **BACKGROUND**

Section 103(a) provides that, except as provided in section 103(b), gross income does not include interest on any State or local bond.

Section 103(b)(1) provides that the exclusion under section 103(a) does not apply to any private activity bond that is not a qualified bond (within the meaning of

section 141).

Section 141(e) provides that the term “qualified bond” includes an exempt facility bond that meets certain requirements.

Section 142(a)(15) provides that the term “exempt facility bond” includes any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified highway or surface freight transfer facilities.

Section 142(m)(1) defines the term “qualified highway or surface freight transfer facilities” as: (1) any surface transportation project that receives Federal assistance under title 23, United States Code (as in effect on August 10, 2005); (2) any project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible and that receives Federal assistance under title 23, United States Code (as so in effect); or (3) any facility for the transfer of freight from truck to rail or rail to truck (including any temporary storage facilities directly related to such transfers) that receives Federal assistance under either title 23 or title 49, United States Code (as so in effect). Examples of facilities for the transfer of freight from truck to rail or rail to truck include cranes, loading docks, and computer-controlled equipment that are integral to such freight transfers. Examples of facilities that are not freight transfer facilities include lodging, retail, industrial, or manufacturing facilities.

Section 142(m)(2)(A) provides a \$15,000,000,000 national limitation on the aggregate face amount of tax-exempt financing for qualified highway or surface freight transfer facilities (the \$15,000,000,000 national limitation).

Section 142(m)(2)(B) provides that an issue is not treated as a qualified highway

or surface freight transfer facility issue if the aggregate face amount of bonds issued pursuant to such issue for any qualified highway or surface freight transfer facility (when added to the aggregate face amount of bonds previously so issued for such facility) exceeds the amount allocated to such facility under section 142(m)(2)(C). Section 142(m)(2)(C) provides that the Secretary of Transportation shall allocate the \$15,000,000,000 national limitation among qualified highway or surface freight transfer facilities in such a manner as the Secretary determines appropriate.

Sections 142(a)(15) and 142(m) apply to bonds issued after August 10, 2005.

#### **ALLOCATIONS BY DEPARTMENT OF TRANSPORTATION**

While sections 142(a)(15) and 142(m) are under the jurisdiction of the Internal Revenue Service, the allocation of the \$15,000,000,000 national limitation is under the jurisdiction of the Department of Transportation. On January 5, 2006, the Department of Transportation published in the Federal Register a notice soliciting requests for allocations of the \$15,000,000,000 national limitation (71 Fed. Reg. 642).

Except as otherwise provided in this notice, if the Secretary of Transportation allocates a portion of the \$15,000,000,000 national limitation to a project or facility, the Internal Revenue Service shall treat the portion of that project or facility which is to be financed with the bonds, as represented in the request for the allocation, as meeting the definition of qualified highway or surface freight transfer facilities in section 142(m)(1). Thus, for example, the Internal Revenue Service will rely on the Secretary of Transportation's determination in allocating a portion of the national limitation to a project or facility that it receives the required Federal assistance under title 23 or title 49

of the United States Code for purposes of the eligible project or facility definition under section 142(m). Whether such representation accurately describes the portion of the project or facility to be financed by the bonds and whether such portion of the project or facility is actually financed by the bonds remains subject to verification upon examination by the Internal Revenue Service. A determination by the Secretary of Transportation that a project or portion thereof meets the definition of qualified highway or surface freight transfer facilities is not a determination that: (1) any amounts are chargeable to a facility's capital account or would be so chargeable either with a proper election by a taxpayer or but for a proper election by a taxpayer to deduct the amounts (see § 1.103-8(a)(1)(i) of the Income Tax Regulations); or (2) any other requirements that must be met in order for interest on the bonds to be excluded from gross income are satisfied.

## **INFORMATION REPORTING**

An issuer of tax-exempt private activity bonds for qualified highway or surface freight transfer facilities must complete Form 8038, *Information Return for Tax-exempt Private Activity Bond Issues*, in accordance with the instructions and complete Part II by checking the box on Line 11m (Other) writing "qualified highway or surface freight transfer facility bonds" in the space provided for the bond description, and entering the amount of the bonds in the Issue Price column.

## **DRAFTING INFORMATION**

The principal author of this notice is Aviva M. Roth of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding

this notice contact Aviva M. Roth at (202) 622-3980 (not a toll-free call).